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IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible] 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, St. Regis Paper Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered December 16, 1960, which affirmed, in part, and reversed, in part, the judgment of the United States District Court for the Southern District of New York.

Citations of Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Dec. 16, 1960) has not been reported in the Federal Reporter. It is reported in CCH Trade Regulation Reporter, Paragraph 69,880, and is

printed in the appendix hereto, pages 1a to 19a. The opinion of the District Court is reported in 181 F. Supp. 862 and is printed in the record[1] filed with this petition at pages 140 to 156.

Jurisdiction of this Court

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

Questions Presented

The judgment of the Court of Appeals for the Second Circuit (a) affirmed that part of the judgment of the District Court requiring petitioner to answer part (approximately one-third) of the questions contained in investigative orders of the Federal Trade Commission (the "Commission") and (b) reversed the District Court's dismissal of a claim for forfeitures demanded under the third paragraph of Section 10 of the Federal Trade Commission Act (the "FTC Act"). The questions presented are:

1. Did the Court of Appeals have jurisdiction to entertain the appeal of the United States from the judgment of the District Court in view of the provisions of Section 2 of the Expediting Act?

2. Does an order and judgment of the District Court under Section 6(c) of the Administrative Procedure Act, modifying agency investigative process, carry with it liability for forfeitures for non-compliance with the original unmodified agency process?

---

1. References hereinafter to the "Appendix" are to the appendix to this petition; references to the "Record" are to the appendix record below, nine copies of which have been filed in accordance with paragraph 4 of Rule 21 of this Court. All references to pages in the Record are to the numbers written in ink at the bottom of such pages.

3. Did the orders of the Commission, purportedly issued pursuant to Section 6(b) of the FTC Act, constitute a requirement that petitioner furnish "answers in writing to specific questions", and not a requirement of a "special report", so that the provisions of the third unnumbered paragraph of Section 10 of the FTC Act, providing for forfeitures in the sum of $100 per day for each day of failure to file a "report", have no application?

4. Should petitioner be required to answer the portion of the Commission's questions which the District Court held were enforceable and not previously answered, where such orders were issued pursuant to Section 6(b) of the FTC Act for the stated purpose of investigating whether petitioner has violated Section 7 of the Clayton Act, one of the "antitrust acts", although only subdivisions (d) and (e) of said Section 6 expressly authorize investigations of violations of the "antitrust acts"?

5. Are petitioner's retained file copies of confidential reports to the Bureau of Census for the Census of Manufactures subject to the investigative processes of the Commission?

6. Does the investigative power asserted by the Commission under Section 6(b) of the FTC Act, if not reviewable except at the risk of paying forfeitures accumulated at the rate of $100 per day throughout the period of noncompliance, including the period of judicial review, deprive petitioner of its property without due process of law?

Statutes Involved

The statutes involved are: the Federal Trade Commission Act, Sections 4, 5, 6, 9 and 10 (38 Stat. 719 (1914), 52 Stat. 111 (1938), 38 Stat. 721, 722 and 723 (1914), 66 Stat. 631 (1952); 15 U.S.C. §§44, 45, 46, 49 and 50); the Administrative Procedure Act, Section 6(b), 6(c) and 10 (60 Stat. 240 and 243 (1946); 5 U.S.C. §§1005(b), 1005(c), and 1009); the Census Act, Sections 5 and 9 (68 Stat. 1013 (1954); 13 U.S.C. §§5 and 9) and the Expediting Act (32 Stat. 823 (1903), 62 Stat. 989 (1948); 15 U.S.C. §29, 49 U.S.C. §45). They are printed in the Appendix, *infra*, pp. 21a to 33a.

Statement

The respondent's (Government's) complaint was stated in two separate counts. The first demanded relief under Section 9 of the FTC Act,[2] which provides for "writs of mandamus",[3] to compel petitioner to comply with nine investigative orders of the Federal Trade Commission to determine whether Section 7 of the Clayton Act[4] was violated.[5] The second count demanded forfeitures pursuant to the third paragraph of Section 10 of the FTC Act[6] for each day that petitioner was claimed to be in default

2. 38 Stat. 722 (1914); 15 U.S.C. §49 (1952).

3. Although writs of mandamus were abolished by Rule 81(b) of the Federal Rules of Civil Procedure, the principles which apply in determining whether relief in the nature of mandamus should be granted were not changed by the Rule. *Hammond* v. *Hull*, 131 F. 2d 23 (D. C. Cir. 1942), cert. denied, 318 U. S. 777 (1943); *Securities and Exchange Commission* v. *Morgan, Lewis & Bockius*, 113 F. Supp. 85 (E. D. Pa. 1953), aff'd. on other grounds, 209 F. 2d 44 (3d Cir. 1953).

4. 64 Stat. 1125 (1950), 15 U.S.C. §18 (1952).

5. Seven of the orders were directed to petitioner's former wholly-owned subsidiaries and two to petitioner.

6. 38 Stat. 723 (1914); 15 U.S.C. §50 (1952).

of the two orders issued to it. Since the claim was based on two "orders", the Government demanded forfeitures at the rate of $200 per day.

The action was defended on the grounds that there was no statutory basis for the Commission's orders and that, in any event, a great many of the questions contained in the orders were objectionable because they were vague and uncertain, required the production of privileged census reports or were duplicative of information previously furnished to the Commission.

As affirmative defenses, petitioner pleaded, among other things, that the Commission acted in contravention of the specific prohibition of Section 6(b) of the Administrative Procedure Act[7] and that the claim for accumulated civil penalties under Section 10 of the FTC Act, while the Commission's investigative powers were under court review, constituted a denial of due process.

After trial on stipulated facts, the District Court held (1) that the Commission had statutory authority to issue its "orders", but the Court refused to enforce the orders in the form issued because most of the questions contained therein were too vague and indefinite or required petitioner to duplicate the "vast amount of information it has supplied",[8] (2) that petitioner's retained file copies of census reports for the Census of Manufactures were not privileged, and (3) that, instead of acceding to petitioner's request that the matter be remitted back to the Commission with directions to issue new Commission orders in

7. Section 6(b) of the Administrative Procedure Act (60 Stat. 240 (1946); 5 U.S.C. §1005(b) (1952)) provides, in part, as follows:

> "Investigations.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law * * *".

8. Record, p. 149.

conformity with the Court's decision, the Court would adopt a "more practical method of dealing with these orders"[9] by treating the Commission's orders as "subpena[s] or similar process or demand", within Section 6(c) of the Administrative Procedure Act (5 U.S.C. §1005(c)) and issue its own order and judgment pursuant to such statute. The Court said:[10]

> "Defendant urges that having found portions of the orders indefinite, we must strike down the entire set. From a practical point of view, this seems silly since it would require the Commission to redraw and reissue the same orders. We believe that ordering partial compliance is a more practical method of dealing with these orders and feel that Section 6(c) of the Administrative Procedure Act, 5 U.S.C.A. 1005(c), affords us ample legal authority to modify these orders. (Cf. *N.L.R.B.* v. *Anchor Rome Mills*, 197 F. 2nd 447; *F.C.C.* v. *Cohn*, 154 F. Supp. 899)."

The District Court denied the Government's claim for forfeitures, saying:[11]

> "• • • the orders on which the Government bottoms its claim for forfeitures are partially defective and since we only enforce those portions of the orders which we find unobjectionable, defendant had a valid reason for challenging these orders as prepared. Therefore, we find the Government has no right to forfeitures under the circumstances."

The District Court entered an order and judgment directing petitioner to answer within 30 days all of the

9. Record, p. 149.
10. Record, p. 148.
11. Record, p. 151.

unobjectionable questions, except those requiring copies of reports to trade associations and copies of reports to the Census of Manufactures which were directed to be answered within 60 days. Petitioner answered fully all questions to be answered in the 30-day period. On the sixtieth day after the entry of the judgment, the Government served a notice of appeal to the Court of Appeals for the Second Circuit appealing from that portion of the District Court's judgment dismissing the Government's claim for forfeitures. Petitioner thereupon filed a notice of cross-appeal from the portion of the judgment requiring the furnishing of answers to the specific questions set out in the District Court's judgment, including the request for copies of reports to trade associations and census reports for the Census of Manufactures, which remained to be furnished.

Petitioner moved for a stay and suspension of the 60-day requirement of the District Court's order and judgment, which was granted. The stay was extended by the Court of Appeals pending its disposition of the appeal.[12]

The Government's appeal did not question the District Court's determination that approximately two-thirds of the questions were "objectionable" or called for information previously furnished and were not to be enforced, but appealed only from the District Court's denial of forfeitures.

Petitioner's cross-appeal raised the question of the constitutional and statutory power of the Commission to make the orders and also whether census reports were subject to the Commission's investigative process.

12. Record, pp. 14-16.

The Court of Appeals affirmed the District Court's holding that Section 6(b) of the FTC Act[13] empowered the Commission to issue its orders to petitioner and that file copies of census reports were not privileged under the Census Act, and reversed the District Court's judgment denying the Government's claim for forfeitures.

Even though relief in the nature of mandamus authorized by Section 9 of the FTC Act, claimed in Count I of the complaint, had not been granted and the District Court had entered its own order and judgment pursuant to Section 6(c) of the Administrative Procedure Act (from which the respondent did not appeal), the Court of Appeals nevertheless held petitioner liable for forfeitures, not at the rate of $200 per day, as claimed by the Government, but only at the rate of $100 per day.

Petitioner moved in the Court of Appeals for (1) a stay of its mandate until a petition to this Court for a writ of certiorari could be considered and, if granted, until the review by this Court could be determined and (2), pursuant to Section 10(d) of the Administrative Procedure Act[14], for postponement of the effective date of the Commission's orders in order to preserve the status of petitioner's rights pending a conclusion of review proceedings in this Court.

In an opinion and decision signed by Circuit Judges Tuttle and Friendly, the Court ordered its mandate stayed, as requested, but failed to grant petitioner's further application for postponement of the effective date of the

13. 38 Stat. 721 (1914); 15 U.S.C. §46(b) (1952).
14. 60 Stat. 243 (1946); 5 U.S.C. §1009(d) (1952).

Commission's orders. However, in a separate opinion, Chief Judge Lumbard stated:[15]

> "I concur, but I would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this court is stayed."

The statement is a clear indication that the Chief Judge of the Court of Appeals would have granted petitioner's motion to postpone the effective date of the Commission's orders pending conclusion of review proceedings in the courts.

Concurrently with filing this petition for a writ of certiorari, petitioner has also filed a separate motion in this Court for an order postponing the effective date of the Commission's orders pending the conclusion of the review in this Court, as requested in this petition.

REASONS FOR GRANTING THE WRIT

I

This Court should consider the application of the Expediting Act to this appeal.

Section 2 of the Expediting Act, as amended,[16] provides in pertinent part as follows:

> "In every civil action brought in any district court of the United States • • • [under the Sherman Act, Interstate Commerce Act, or "any other Acts

15. Appendix, p. 20a.

16. 32 Stat. 823 (1903), 62 Stat. 989 (1948); 15 U.S.C. §29, 49 U.S.C. §45 (1952).

> having a like purpose"] wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

In the decision of the Court of Appeals granting petitioner's application for a stay and suspension of the portions of the judgment of the District Court requiring compliance within 60 days, Circuit Judge Friendly stated the following:[17]

> "The parties are requested to consider whether, under §2 of the Act of February 11, 1903, c. 544, 32 Stat. 823, as amended by §17 of the Act of June 25, 1948, c. 646, 62 Stat. 989, the appeals have been properly taken to this Court, and to discuss this in their briefs. See *United States* v. *New York, New Haven & Hartford R. Co.*, 276 F. 2d 525, 537-543 (2d Cir. 1960) [*cert. denied sub nom. Tri-Continental Financial Corp.* v. *United States*, 362 U. S. 961 (1960)]."

In the briefs in the Court of Appeals, the Government took the position that the appeal had properly been taken to the Court of Appeals and that the provision of the Expediting Act had no application in the circumstances of this case. Petitioner's brief also expressed the belief that the appeal had been properly taken.

The Court of Appeals found the appeals properly taken to that Court, but said:[18]

> "Were we to accept literally the language of §2 of the Expediting Act, 49 U.S.C. §45, we would be required to dismiss these appeals although both parties urge us to hear them."

17. Record, p. 16.
18. Appendix, p. 4a.

However, as the parties cannot confer jurisdiction, the question must be decided by this Court.

Since the appeal of the United States from the judgment of the District Court was in a civil action brought by the United States as plaintiff and was founded upon the provisions of the FTC Act, the purpose of which is to protect trade and commerce, *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 435 (1920), there are grounds for holding that the Expediting Act does apply. So far as we are aware, this Court has never decided the question.

If the Court finds that the Expediting Act does apply, the judgment of the Court of Appeals below was a nullity. In that event the judgment of the District Court dismissing the Government's claim for forfeitures would stand unappealed unless the Government, in its brief in opposition to this petition, should request that the case be treated as an appeal taken by the Government directly to this Court and such request is granted.

II

The decision of the Court of Appeals is contrary to the requirement of the Administrative Procedure Act that partial enforcement of an administrative agency's subpoena or similar investigative process cannot carry with it liability for penalties for non-compliance prior to judicial review.

In its opinion, the Court of Appeals recognized that the District Court had not granted the Government's demand for mandamus,[19] but had, rather, exercised subpoena-enforcing powers under Section 6(c) of the Administra-

19. Appendix, p. 14a.

tive Procedure Act.[20] Since the orders were not enforced under the FTC Act, the treatment of the orders as "subpena[s] or similar process or demand" and the enforcement thereof under the Administrative Procedure Act make the decision below applicable to the enforcement of all agency investigative process falling within the classification of "subpena[s] or other similar process or demand" under the Administrative Procedure Act. The Court of Appeals held that where such enforcement power is exercised, even in part, penalties under the statute authorizing the process[21] must be adjudged for the recipient's noncompliance with the subpoena or similar process prior to judicial review. The Court said, without citing any authority:[22]

> "Although modification of an agency's order under §6(c) of the Administrative Procedure Act results in the most efficient treatment of a partially void order, it carries with it the imposition of penalties for prior noncompliance."

This is precisely what the legislative reports accompanying the Act said Section 6(c) was designed to prevent.

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20. This section is entitled "Subpenas". Although principally intended to regulate judicial enforcement of federal agency subpoenas it applies as well to "other similar process or demand."

21. Statutes which prescribe penalties for non-compliance with agency process include the Fair Labor Standards Act, Section 9 (52 Stat. 1065 (1938); 29 U.S.C. §209); the Interstate Commerce Act, Section 20(7)c (54 Stat. 918 (1940); 49 U.S.C. §20(7)c), and Section 46 (27 Stat. 443 (1893); 49 U.S.C. §46); the Securities Exchange Act of 1934, Section 32(b) (49 Stat. 1380 (1936); 15 U.S.C. §78ff(b); Communications Act of 1934, Section 409(m) (48 Stat. 1096 (1934), 66 Stat. 721 (1952); 47 U.S.C. §409(m)).

22. Appendix, p. 18a.

The House Report[23] stated:

> "• • • The section [6(c)] expressly recognizes the right of parties subject to administrative subpoenas to contest their validity in the courts prior to subjection to any form of penalty for noncompliance."

The Senate Judiciary Committee in its Committee Print of June 1945[24] stated:

> "• • • Subsection (c) is designed to • • • recognize that a private party may contest the validity of an administrative subpoena issued against him prior to incurring penalties for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search or seizure involved. The 'haphazard' and often unfair methods of issuance of administrative subpoenas were recognized in the Final Report of the Attorney General's Committee (pp. 124-125, 414-415)."

Section 6(c), quoted in full at p. 27a of the Appendix, provides that the only consequence of judicial enforcement of an agency subpoena or similar process is liability for punishment "for contempt in case of contumacious failure to comply" with the court order of enforcement.

As the House and Senate reports show, the Congressional intent was that no penalties should attach for preenforcement noncompliance, even where the agency process is enforced as issued. Where the agency process is held to be defective and not enforced as issued by the

23. H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) reproduced in Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong. 2d Sess. (1946) at p. 265.

24. Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong. 2d Sess. (1946), p. 27.

administrative agency, Congress could not have intended that a party should be penalized for seeking judicial review.

In *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), referring to an order to enforce a subpoena under Rule 17 of the Federal Rules of Civil Procedure, this Court said (at p. 221):

> "One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad."

It is significant that in the separate concurring opinion of Circuit Judge Friendly below (which, in effect, expresses a different view from Chief Judge Lumbard regarding the fairness of the exaction of statutory penalties where the recipient of a Commission order has not itself initiated an action for a declaratory judgment or a proceeding under the Administrative Procedure Act) he said:[25]

> "If he [the recipient] prefers to await suit and then succeeds in demonstrating such extensive invalidity that there is no longer an intelligible requirement for an 'annual or special report' he is entitled to prevail. Per contra his utilization of the Declaratory Judgment Act or the Administrative Procedure Act will not avail him if he proves wrong, save, of course, for such periods as the direction has been stayed."

When considering the extent to which the Commission's orders in the instant case were "good" or "bad" within the

25. Appendix, p. 19a.

rule stated in *Bowman* and the "extensive invalidity", as mentioned in Circuit Judge Friendly's concurring opinion below, it is to be kept in mind that only approximately one-third of a total of 360 or more separate questions contained in the Commission's orders issued to petitioner and its former subsidiaries were required to be answered, including questions requiring the production of petitioner's retained file copies of Census Reports to the Census of Manufactures, which petitioner has claimed are privileged, a position sustained in *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 (7th Cir. 1960), *cert. denied*, —U. S.—(1960). For further argument on this point see *infra* under Point IV.

It is also significant that, after finding that only one-third of the questions should be enforced, the District Court recognized that it was discretionary whether to dismiss the Government's complaint in its entirety or exercise its powers under Section 6(c) of the Administrative Procedure Act and require answers to the remaining one-third of the questions. The District Court exercised its discretion in favor of partial enforcement in the belief that petitioner would be free of liability for penalties. On this understanding, the District Court felt that it would be "silly"[26] to inconvenience the Commission by requiring it to issue a new order which would omit the "bad" questions. When the Court of Appeals below held, erroneously, in our view, that a "modification" of the Commission's "partially void order * * * carries with it the imposition of penalties for prior noncompliance" the Court compounded its error by failing to remand the case to the District Court so that it could then determine whether, in view of these consequences, it would exercise

26. Record, p. 149.

its discretion in the same way, or remand the matter to the Commission with directions to issue new questions in conformity with the Court's decision.

The Court of Appeals below recognized that the District Court had modified the Commission's order pursuant to Section 6(c) of the Administrative Procedure Act, and had not acted pursuant to section 9 of the FTC Act, as the Government requested. The Court said[27]:

> "Finding authorization to modify enforcement of the orders in §6(c) of the Administrative Procedure Act, 5 U.S.C. §1005(c), Judge Ryan directed that only the enforceable questions be answered. Cf. NLRB *v.* Anchor Rome Mills, Inc., 197 F. 2d 447 (5 Cir. 1952)."[28]

However, when faced with the question whether, because of the substantial defects in the Commission's orders, the District Court had the option, in its discretion, either (a) to dismiss the claim for mandamus or (b), pursuant to the subpoena-enforcing powers granted in Section 6(c) of the Administrative Procedure Act, to modify the order and enforce it as so modified, the Court said[29]:

> "• • • A district judge might believe that the assessment of a forfeiture would be unfair in light of the substantial defects in the agency's order, and might thus be encouraged merely to deny the petition for mandamus thereby forcing the agency to re-issue the valid portions of its order. Whether, as a result of §6(c) of the Administrative Procedure Act, such a total refusal may be sustained is a

27. Appendix, p. 14a.

28. *National Labor Relations Board* v. *Anchor Rome Mills*, cited by the Court of Appeals below, involved a subpoena issued by the NLRB pursuant to Section 11 of the National Labor Relations Act, 29 U.S.C. §161 (1952).

29. Appendix, p. 18a.

> question which hinges on the construction of the word 'subpoena' in the statute, *and we do not decide it here.*" (emphasis added.)

We respectfully submit that the Court of Appeals was forced to decide the question, since the District Court had, in fact, acted pursuant to Section 6(c) of the Administrative Procedure Act and since this decision was a necessary step in determining whether the District Court's action was discretionary. As pointed out above, if the District Court's action was discretionary, then the case should have been remanded to it so that, in exercising its discretion, it could take into account the adverse consequences which, in the view taken by the Court of Appeals, followed from the manner in which its discretion was exercised.

The decision below presents an important question of federal law which has not been, but should be, settled by this Court.

III

The Commission's orders required "answers in writing to specific questions"; the $100 per day forfeiture provision of Section 10 of the FTC Act was, therefore, not applicable.

The questions which petitioner was directed to answer in the order and judgment of the District Court were selected by the District Court from the large number of questions stated in the orders issued by the Commission purportedly under Section 6(b) of the FTC Act. That section authorizes two kinds of requirements. These are (1) a requirement of "annual or special, or both annual and special, reports" and (2) a requirement of "answers

in writing to specific questions". The third paragraph of Section 10 of the Federal Trade Commission Act, which prescribes the $100 per day forfeitures, penalizes only the failure to furnish any "annual or special report". It does not mention "answers in writing to specific questions".

There are clear distinctions between requirements for the furnishing of "annual or special, or both annual and special, reports", on the one hand, and a requirement for "answers in writing to specific questions" on the other. The requirement of the report, presumably, would cover one of the several subjects listed in Section 6(b) *i.e.*, "organization", "business", some particular "conduct", "practices", "management" or some particular "relation" to other corporations, etc. A requirement for a "report" indicates only the general nature of the contents of the report, giving the reporting corporation latitude in determining the specific information to be stated. The corporation is not required to determine the meaning of vague and uncertain questions; nor is it required to determine whether the questions asked require the furnishing of privileged information or are otherwise improper. On the other hand, where "answers in writing to specific questions" are required—as in the case of subpoenas—the recipient of the order has no discretion. It must answer the precise questions put to it. (This was the case with the orders here.)

Except for the form of the process, a requirement of "answers in writing to specific questions" is substantially the same as a subpoena. Indeed, by relying on Section 6(c) of the Administrative Procedure Act, the District Court necessarily held that they were "similar". The consequence of non-compliance with such a requirement should be the same as for non-compliance with a subpoena, and this is precisely what the *first* paragraph of Section

10 of the FTC Act provides.[30] The third paragraph of Section 10 imposes forfeitures only for failure to furnish reports.

The Court of Appeals agreed with petitioner that the $100 per day penalties are not assessable for failure to supply "answers in writing to specific questions". However, commenting that "the line between the two is, by the nature of each quite indistinct", the Court held that the orders in this case required "special reports" and that petitioner was therefore liable for the forfeitures.

If the line between "reports" and "answers in writing to specific questions" were "indistinct", the issue should not have been resolved against petitioner so as to make the forfeiture statute applicable. Forfeiture statutes, being in the nature of penal statutes, should be strictly construed. *United States* v. *One Ford Coach*, 307 U. S. 219, 226 (1939); *Farmers' & Mechanics' National Bank* v.

30. This paragraph provides as follows:

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment."

Proceedings under this paragraph may be enjoined in order to permit the recipient to judicially contest the validity of the process, and penalties may not be incurred until a court order of enforcement has been disobeyed, *Federal Trade Commission* v. *Millers' National Federation*, 23 F. 2d 968 (D. C. Cir. 1927); and see *Federal Trade Commission* v. *Millers' National Federation*, 47 F. 2d 428 (D. C. Cir. 1931); see also *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363 (1942) involving a subpoena issued pursuant to Section 9 of the Fair Labor Standards Act (60 Stat. 1095 (1946); 29 U.S.C. §209) which incorporates by reference sections 9 and 10 of the FTC Act.

Dearing, 91 U. S. 29, 35 (1875); *Hannifin* v. *United States*, 248 F. 2d 173 (9th Cir., 1957).

Furthermore, if, *arguendo*, the orders originally issued by the Commission required "reports", after the District Court struck out two-thirds of the questions and made its own order, nothing remained to be answered but a designated series of specific "questions" listed in the Court's order. The Commission's original "orders" had been completely superseded by the District Court's order. As the Court of Appeals for the Ninth Circuit said, in *Flotill Products, Inc.* v. *Federal Trade Commission*, 278 F. 2d 850 (1960), *cert. denied*,—U. S.—(1960) (referring to an order of the district court which had modified a Federal Trade Commission investigative subpoena *duces tecum* and, as modified, enforced it), at page 852:

> "Once the order of the trial court was entered, the hearing examiner's subpoena was superseded and became inoperative and irrelevant."

So far as we are aware, the decision below is the first case holding that the $100 per day forfeiture provision of Section 10 of the FTC Act applies to a subpoena-like list of questions, answerable by mail. The only other decision on this question was conceded by the Court of Appeals below to be to the contrary,[31] *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S.D.N.Y. 1938). The Court chose not to follow Judge Woolsey's decision in that case.

There is presented here a separate, important question of federal law not previously considered by this Court.

31. Appendix, p. 15a.

IV

The decision of this Court in *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950), is not applicable here. This Court did not hold there that the Commission has power under Section 6(b) of the FTC Act to make investigative orders for the purpose of determining whether one of the antitrust acts may have been violated.

The order of the Commission, made pursuant to Section 6(b) of the FTC Act, for the purpose of determining whether Section 7 of the Clayton Act[32] has been violated, was not "authorized by law" as required by Section 6(b) of the Administrative Procedure Act.

Although, so far as we are aware, this Court has not considered the question, the subpoena may be available to the Commission in the performance of its statutory duties to investigate possible violations of the antitrust laws—including Section 7 of the Clayton Act.

The instant case was concededly brought as a "test case"[33] to determine whether the Commission could also resort to the powers under Section 6(b) of the FTC Act for this purpose.

Petitioner's position is that Congress expressly conferred antitrust investigative powers on the Commission in subsections (d) and (e) of Section 6 of the FTC Act

32. 64 Stat. 1125 (1950); 15 U.S.C. §18 (1952).

33. See excerpt from trial transcript, Record, p. 17; see also remarks of Commissioner Tait at page 82 of New Theories of Federal Trade Commission Enforcement, CCH 1960 Antitrust Law Symposium, in which the proposed use of Section 6(b) reports to investigate Robinson-Patman Act violations was described as "ingenious and even revolutionary."

(which require direction by the President or Congress or a request from the Attorney General) and that the omission of such powers in subsection (b) of Section 6 shows a clear intention that power to investigate possible "antitrust" violations is not conferred in subsection (b) under the maxim *expressio unius est exclusio alterius.*[34]

In the court below the government relied primarily on the *dictum* in *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950) that Section 6 could be used for "any purpose within the duties of the Commission, including a §5 proceeding." But *Morton Salt* did not involve an "antitrust" investigation and the Court, in the quoted language, was not focusing on Section 6(b), but was considering the entire Section 6. There the question was whether the Commission could require from Morton a report of compliance with an existing cease and desist order, which had been affirmed by the Court of Appeals in a prior action brought under Section 5 of the FTC Act[35] and whether Morton was committing any new violations of Section 5. Section 5 of the FTC Act is not one of the "antitrust Acts" as defined in Section 4 of the FTC Act.[36] The Commission's investigation in the case at bar involved Section 7 of the Clayton Act, which is one of the "antitrust Acts" as defined in Section 4. Thus the dictum in *Morton* has no application here. The maxim *expressio unius est exclusio alterius* was not applicable in *Morton.*

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34. *Hunt Foods and Industries, Inc.* v. *Federal Trade Commission*, —F. 2d— (9th Cir.) decided December 15, 1960, involved an FTC subpoena issued in an investigation as to whether Section 5 of the FTC Act had been violated. The Court, by way of dictum, referred to Section 6(b) and, without citing any authority, rejected the argument "*expressio unius est exclusio alterius*".

35. 66 Stat. 631 (1952); 15 U.S.C. §45 (1952).

36. 38 Stat. 719 (1914); 15 U.S.C. §44 (1952).

The Court of Appeals below did not agree that *Morton* was distinguishable because it involved a violation of Section 5 of the FTC Act—not one of the defined "antitrust Acts". The Court below said:[37]

> "• • • Since §5 'minimally • • • registers violations of the Clayton and Sherman Acts,' Times-Picayune Publishing Co. *v.* United States, 345 U. S. 594, 609 (1953), the §6 powers are available to the Commission in precomplaint antitrust proceedings as well."

Admittedly, subdivisions (d) and (e) of Section 6 are so available.

But *Times-Picayune* does not destroy the distinction between *Morton*, involving Section 5 of the FTC Act, and the case at bar, which is an investigative proceeding under Section 6(b) to determine whether one of the "antitrust Acts" may have been violated. Merely because every violation of Section 7 of the Clayton Act may also include a violation of Section 5 of the FTC Act, it does not follow that the reverse is true, namely, that every violation of Section 5 of the FTC Act also involves a possible violation of Section 7 of the Clayton Act, or of any other "antitrust Act"; nor does it follow that the Commission's investigative powers relating to the lesser included offense, *i.e.*, a violation of Section 5 of the FTC Act, are available where a possible violation of the greater, embracing offense, *i.e.*, a violation of Section 7 of the Clayton Act, is under investigation.

Congress did not intend that the sweeping investigative power granted to the Commission in Section 5 cases should be available where violations of the antitrust laws are being investigated. A finding of violation of the antitrust

37. Appendix, p. 8a.

laws may lead to much more serious consequences than the cease and desist order which follows from a finding of violation of Section 5 of the FTC Act. Congress provided the investigated party with greater protection where the antitrust laws are involved by providing in Section 6(d) that the "direction" of the President or either House of Congress and in Section 6(e) that the "application" of the Attorney General are conditions precedent to the Commission's power to make such investigations.

In the Task Force Report on Regulatory Commissions, Appendix N (1949), prepared for the Hoover Commission, it was stated, at page 121:

> "Section 6 of the Federal Trade Commission Act gives the Commission wide investigatory powers over the business economy. Its purpose was twofold: (1) to provide general information on corporate practices and relationships as a guide to legislation and public opinion, and (2) upon direction of the President or either House of Congress to report the facts on violation of the antitrust laws by any specific corporation * * *."

The statements in annual reports of the Federal Trade Commission to Congress are to the same effect. See, for example, the Commission's 1959 Report to Congress at page 11.

The Court of Appeals below misreads the legislative history of the FTC Act to support the conclusion that Section 6(b) thereto could be used for antitrust investigations.[38]

We respectfully submit that the Court's discussion of the legislative history proves only, and we agree, that Sections 6(a) and 6(b) of the FTC Act represent the

38. Appendix, pp. 9a to 11a.

re-enactment of the powers formerly exercised by the Bureau of Corporations. As the Court points out, it was Section 9 of the House Bill (H.R. 15613, 63rd Cong. 2d Sess. (1914)) which became Sections 6(a) and 6(b) of the Act.

The Bureau of Corporations, however, never had power to investigate possible violations of the antitrust laws. An entirely new power was incorporated in a separate section of the House Bill, Section 3(c), which provided for investigating possible violations of the antitrust laws, which investigations were to be made when directed by the President or Congress or at the request of the Attorney General. This became Sections 6(d) and 6(e) of the FTC Act.

Clearly, whether the Commission has power under Section 6(b) to investigate possible violations of Section 7 of the Clayton Act is an important question of federal law which has not been, but should be, settled by this Court.

V

This Court should resolve the direct conflict between the decision below and the decision of the Seventh Circuit Court of Appeals in *Federal Trade Commission* v. *Dilger* that file copies of census reports to the Census of Manufactures are privileged.

The facts in *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 (7th Cir. 1960), *cert. denied*—U. S.—1960, are identical with the facts relating to census reports in the case at bar, except that in *Dilger* the Commission's process was a subpoena *duces tecum* issued pursuant to Section 9 of the FTC Act, whereas here the specific ques-

tions were required to be answered pursuant to Section 6(b) of the FTC Act. In both cases the same census report forms (Form MC20C) were requested.

The decision of the Court of Appeals for the Seventh Circuit in *Dilger* is, however, in conflict with the decision of the Court of Appeals for the Second Circuit in this case. The Court of Appeals below recognized the conflict. It said:[39]

> "We disagree with the Seventh Circuit decision regarding the same issue in F.T.C. *v.* Dilger, 276 F. 2d 739 (7th Cir. 1960); cert. denied—U. S.—1960."

Here petitioner relies largely on the reasons stated in the opinion of Chief Judge Hastings, writing for a unanimous court in *Dilger*, that file copies of retained census reports are made privileged by Section 9 of the Census Act (68 Stat. 1013 (1954); 13 U.S.C. §9) (which was concurred in by the Bureau of the Census and the Bureau of the Budget[40]).

One of the arguments which was made in *Dilger*, and which petitioner made below, was that the requested information was prepared for and submitted to the Bureau of Census upon assurances of confidentiality from the President, Congress and the Bureau of Census, and that petitioner's file copies were retained in order to prepare subsequent census reports for the convenience of the Government pursuant to the instructions printed across the bottom of the census forms to "Keep This Copy For Your Files".

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39. Appendix, p. 13a.

40. See the statement of the Solicitor General of the United States in the petition for writ of certiorari in that case and the Memorandum for the Secretary of Commerce filed at the request of the Secretary of Commerce by the Solicitor General.

The Court of Appeals below said, in answer to this argument:

> "Although the Census Bureau printed across the bottom of the copy page, 'Keep This Copy For Your Files' there was, in fact, no obligation on the respondents to do so • • •."

This ignores the fact that the Section 5 of the Census Act,[41] specifically authorizes the Secretary of Commerce to prescribe the form of the schedules.

In *United States, ex rel. City of Atlanta, Ga.* v. *Steuart*, 47 F. 2d 979 (D. C. Cir. 1931)[42] the court held (at pages 981-982):

> "• • • the national census is exclusively within the authority of the Congress of the United States, and the Director of the Census has been designated as the administrative agency through which that authority shall be exercised. The director is necessarily invested with discretion in matters of form and procedure when these are not specifically provided for by law • • •."

The Court of Appeals' holding is an open invitation to the business community to discard its file copies of census reports rather than risk having to turn over to other federal agencies material confidentially prepared for and submitted to the Bureau of the Census in reliance upon assurances of confidential treatment. A file copy of a census report is not a record kept in the regular course of business.

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41. 68 Stat. 1013 (1954), 13 U.S.C. §5.

42. See also *United States* v. *Moriarity*, 106 Fed. 886, 891 (2d Cir. 1901); and *United States* v. *Grayson*, 166 F. 2d 863, 870 (2d Cir. 1948) in which it was indicated a privilege could be created by departmental regulation.

The vital work of the Bureau of the Census in preparing economic statistics depends in large measure on the effectiveness of its assurance of confidential treatment. If the Court of Appeals for the Second Circuit is not reversed, the Bureau's work will be seriously encumbered.

The direct conflict in the decisions on the same question of the Seventh and Second Circuits, as pointed out above, is, we submit, a further valid reason for the granting of the writ so that this Court may resolve the conflict and at the same time settle the other important questions of federal law which have not been, but should be, settled by this Court.

VI

Section 6(b) of the Federal Trade Commission Act as applied by the Federal Trade Commission in this case deprives petitioner of its property without due process of law.

The case at bar presents a serious and novel question of constitutional law. As applied by the Commission, Section 6(b) of the FTC Act permits the Commission to issue investigative orders which may not be reviewed unless the recipient of such orders awaits enforcement proceedings, thus running the risk of having to pay forfeitures which accumulate at the rate of $100 per day during the entire period until conclusion of judicial review. In the District Court and in the Court of Appeals petitioner relied on a line of cases holding that a judicial review beset by such obstacles and conducted under such conditions of duress does not amount to due process.

Natural Gas Co. v. *Slattery*, 302 U. S. 300 (1937);
Oklahoma Operating Co. v. *Love*, 252 U. S. 331 (1920);
St. Louis Iron Mountain & Southern Ry. Co. v. *Williams*, 251 U. S. 63 (1919);
Wadley Southern Ry. Co. v. *Georgia*, 235 U. S. 651 (1915);
Missouri Pacific Ry. Co. v. *Tucker*, 230 U. S. 340 (1913);
Ex parte Young, 209 U. S. 123 (1908).

The Court of Appeals below agreed that:

> "• • • If judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply, the procedure might not meet the established standards of due process. Cf. *Oklahoma Operative Co.* v. *Love*, 252 U. S. 331 (1920) • • •."[43]

Whether or not judicial review is so limited depends on whether *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160 (1927) is still good law. That case holds that the recipient of a 6(b) order cannot enjoin enforcement thereof, but must await the institution of enforcement proceedings by the Attorney General.

The Court of Appeals has by its decision in the case at bar declared *Claire Furnace* overruled. It held petitioner could have instituted an action for judicial review under the Administrative Procedure Act or Declaratory Judgment Act.[44] The Court observed, however, that:

> "• • • it is only if such a remedy is available that the forfeiture sanction can withstand attack on due process grounds."[45]

43. Appendix, p. 16a.
44. 48 Stat. 955 (1934); 28 U.S.C. §2201 (1952).
45. Appendix, p. 17a.

Prior to the institution of this action, the Commission had advised petitioner's counsel that it would rely on *Claire Furnace* to resist any action instituted by petitioner under the Administrative Procedure Act or Declaratory Judgment Act.[46] While further conferences were being arranged, the instant action was commenced. Petitioner could thus plead the unlawfulness of the Commission's orders under the Administrative Procedure Act only by way of affirmative defense, which it did.[47]

Moreover, throughout this litigation, the Government has taken the position that *Claire Furnace* remains the law and that petitioner had no remedy either under the Administrative Procedure Act or the Declaratory Judgment Act. In the Government's main brief in the Court of Appeals, at page 23, it was said:

> "Since Claire Furnace, which has never expressly been overruled or limited, holds that the enforcement proceedings are such an adequate remedy at law it would appear that review under the Administrative Procedure Act is inapplicable. And this would appear to hold good for the Declaratory Judgment Act, as well, since that statute requires a 'case of controversy'—and as Claire Furnace makes clear, there is no case of controversy before the United States exercises its independent judgment as to whether to bring enforcement proceedings • • • [citing cases]."

More important, the Court of Appeals below was not consistent in its position that Administrative Procedure Act relief was available to petitioner in this case.

In its motion for a stay of the mandate of the Court of Appeals, petitioner requested, as additional relief, that

46. Record, pp. 36, 37.
47. Answer, Para. 14, Record, p. 22.

the Court grant an order pursuant to Section 10(d) of the Administrative Procedure Act postponing the effective date of the Commission's order, thus tolling the forfeitures. Although, as noted above, Chief Judge Lumbard wrote a concurring opinion stating that he would stay the accumulation of penalties for the same period that the mandate is stayed,[48] the majority of the Court failed to take any action with respect to the request. In short, the majority of the Circuit Judges below recognized in their opinion the availability of relief under the Administrative Procedure Act. However, when petitioner requested such relief (in its subsequent motion to postpone the effective date of the Commission's orders pending the conclusion of judicial review in this Court) the Court failed to grant it.

Concurrently with the filing of this petition, petitioner has filed a motion in this Court renewing its application, pursuant to Section 10(d) of the Administrative Procedure Act, for a postponement of the effective date of the Federal Trade Commission's orders until the conclusion of review in this Court. If such motion is granted, petitioner's constitutional objection will have been satisfied, and the argument made in this Point VI may be ignored. On the other hand, if the motion is denied and petitioner does not have a right under Section 10(d) of the Administrative Procedure Act to postpone the effective date of the agency action during the period of judicial review, then petitioner must litigate the validity of the Commission's investigative process under conditions of duress which amount to a denial of due process.

48. Appendix, p. 20a.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

HORACE R. LAMB,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16—OCTOBER TERM, 1960.

(Argued September 30, 1960 Decided December 16, 1960.)

DOCKET No. 26413

UNITED STATES OF AMERICA,
Appellant,

v.

ST. REGIS PAPER CO.,
Appellee.

Before—LUMBARD, Chief Judge,
TUTTLE* and FRIENDLY, Circuit Judges.

Cross-appeals from an order of the United States District Court for the Southern District of New York, Sylvester J. Ryan, J., 181 F. Supp. 862, directing that respondent file special reports under §6(b) of the Federal Trade Commission Act, 15 U. S. C. §46(b), and dismissing claim for statutory penalties for default in filing reports.

Affirmed in part and reversed in part.

RICHARD H. STERN, Washington, D. C. (Robert A. Bicks, Assistant Attorney General, Richard A. Solomon, Washington, D. C., S. Hazard Gillespie, Jr., United States Attorney, Southern

* Sitting by designation.

District of New York, Daniel J. McCauley, Jr., General Counsel, Federal Trade Commission, Alan B. Hobbes, Assistant General Counsel, Federal Trade Commission, New York, N. Y., J. B. Truly, Attorney, Federal Trade Commission, Washington, D. C., on the brief), for appellant.

HORACE R. LAMB, New York, N. Y. (H. Richard Wachtel, Douglas W. Hawes, LeBoeuf, Lamb & Leiby, New York, N. Y., on the brief), for appellee.

LUMBARD, Chief Judge:

These are appeals from a judgment of the United States District Court for the Southern District of New York, Ryan, J., in which the court partially enforced nine orders issued by the Federal Trade Commission against the St. Regis Paper Company and seven of its subsidiary corporations directing that special reports be filed and dismissed a claim for statutory penalties brought by the United States against St. Regis. By resolution of January 6, 1959, the Federal Trade Commission instituted an investigation into the acquisition by St. Regis of the stock and/or assets of other corporations engaged in interstate commerce in order to determine whether §7 of the Clayton Act, 15 U. S. C. §18, had been violated. On January 9, 1959, the Commission issued orders to St. Regis in New York City and five of its wholly-owned corporations located in various parts of the country.[1] These orders allowed the addressees thirty days

1. Growers Container Corp. (Salinas, Calif.), F. J. Kress Box Co. (Pittsburgh, Penna.), Pacific Waxed Paper Co. (Seattle, Wash.), Pollock Paper Corp. (Dallas, Texas), Rhinelander Paper Co. (Rhinelander, Wis.).

to respond in writing in a "special report" to questions posed by the Commission and demands for copies of agreements, correspondence, office memoranda, annual reports, schedules, minutes of meetings, accountants' reports, and statistical summaries. St. Regis' motion to vacate the resolution and orders was denied by the Commission on May 6, 1959, and compliance ordered by May 28. On June 4, 1959, the Commission resolved to broaden its investigation to cover the acquisition of two other corporations[2] by St. Regis. Orders dated June 8, 1959 allowed St. Regis and the two subsidiaries thirty days to file special reports similar in content to those requested by the earlier directives.

Upon deciding that the material submitted to it did not meet its demands, the Commission filed notices of default against St. Regis and its subsidiaries on June 18 and July 22. The United States then brought suit in the Southern District of New York under §9 of the Federal Trade Commission Act, 15 U. S. C. §49, asking that a mandatory injunction issue commanding the corporations to file the special reports as requested and that the statutory penalties provided for by §10 be assessed at the rate of $200 per day against St. Regis for its failure to respond to the two orders directed to it. The defendant's motion to strike the second demand on the ground that such relief would be unconstitutional was denied, 24 F. R. D. 366 (S. D. N. Y. 1959), and the case went to trial in the district court on both counts. Judge Ryan held that the Commission had the authority under §6(b) of the Federal Trade Commission Act, 15 U. S. C. §46(b), to order special reports in connection with pre-complaint investigations of possible

2. Cupples-Hesse Corp. (St. Louis, Mo.), Northwest Door Co. (Tacoma, Wash.).

violations of the Clayton Act, §7; that some of the questions posed by the Commission were so vague and uncertain as to be unenforceable; and that the statutory forfeiture could not be invoked to penalize non-compliance with orders which are partially defective. 181 F. Supp. 862 (S. D. N. Y. 1960). The judgment below therefore modified the terms of the original orders insofar as it directed the defendant and its subsidiaries to reply only to those questions held enforceable and dismissed the second count of the government's complaint. The United States appeals from the dismissal, and St. Regis cross-appeals from the part of the judgment granting injunctive relief.

I.

Were we to accept literally the language of §2 of the Expediting Act, 49 U. S. C. §45,[3] we would be required to dismiss these appeals although both parties urge us to hear them. That statute, as amended, provides in terms that in "every civil action" which the United States brings as a plaintiff in the district courts under the Sherman Act,

3. The relevant provisions of the statute as amended to date (56 Stat. 199, 62 Stat. 989) are as follows:

> "That in any civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, "An Act to regulate commerce," approved February 4, 1887, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is plaintiff, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance * * *
>
> "Sec. 2. In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

Interstate Commerce Act, or "any other Acts having a like purpose" thereafter enacted, appeals from final judgments are to "lie only to the Supreme Court." Both of the instant appeals are from a judgment entered in a civil suit instituted by the United States against various corporations under a statute which contains provisions similar in purpose to those of the Sherman Act.[4] However, we have construed the language of the statute, which as a result of an amendment of 1948 (62 Stat. 989) relates to "every civil action" instead of to "every suit in equity," as including only suits akin to actions in equity. *United States* v. *New York, N. H. & H. R.R.*, 276 F. 2d 525, 543 (2d Cir. 1959). The statutory penalty sought by the United States in its appeal is, indeed, not at all similar to equitable relief. However, this fact alone is not decisive of the question before us. Since the heart of the issue being litigated is the scope of authority delegated to the Commission by Congress, the request for a forfeiture is but auxiliary to the demand for compliance. Thus, even if we were inclined to allow an appeal from one part of a judgment if an appeal from another part of the same judgment would properly lie only to the Supreme Court, we would not consider alone the appeal of the United States in this case. The unseverability of the issues to be decided requires that they all be determined in one action by the tribunal which is to pass on the basic question presented.

4. Not only is any violation of the Sherman and Clayton Acts also a violation of §5 of the Federal Trade Commission Act, *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 609 (1953), but the Federal Trade Commission is expressly authorized by §6 of the Act to investigate antitrust violations and by §7 to act as a "master in chancery" to report on the proper form of an antitrust decree. Moreover, §11 of the Clayton Act, 15 U. S. C. §21, authorizes the Commission to enforce compliance with §7 of the Act.

Nonetheless, we feel that a reasonable construction of the Expediting Act grants this court jurisdiction over appeals such as the one now before us. The writ of mandamus authorized by §9 is, it is true, very much like a mandatory injunction, *cf. Miguel* v. *McCarl*, 291 U. S. 442, 452 (1934), particularly since it is addressed not to some public official or body but to a private corporation.[5] But it would be unreasonable to hold that the type of relief sought here by the Commission or the kind of determination which is to be made on such petitions for mandamus were deemed important enough by Congress to require a clear path from the district court to the Supreme Court of the United States.

Under 15 U. S. C. §45 as it stood before being amended in 1938, 52 Stat. 111, the Federal Trade Commission, to make its order final, was required to bring enforcement proceedings in the Court of Appeals upon learning that the order had been violated, and until 1959 all cease-and-desist orders issued by administrative agencies pursuant to §11 of the Clayton Act, 15 U. S. C. §21, had to be enforced in the same way. See 73 Stat. 243 (1959). Appeals from cease-and-desist orders of the Commission under 15 U. S. C. §§21(g), 45(g) are still taken to the Court of Appeals. Thus, were we to hold that the mandamus provision of §9 brings actions for the enforcement of preliminary requests for information within §2 of the Expediting Act, we would be conceding greater signifi-

5. In *United States* v. *Morton Salt Co.*, 80 F. Supp. 419 (N. D. Ill., 1948), aff'd, 174 F. 2d 703 (7th Cir. 1949), rev'd, 338 U. S. 632 (1950), discussed *infra*, the request sought by the Attorney General under §9 was framed not as a petition for mandamus but as a request for a mandatory injunction. See 80 F. Supp. at 425. The request in this case was similarly phrased.

cance to the early investigatory stages of a Clayton Act proceeding than to the final determination of the enforcing agency. Furthermore, it is only because the Federal Trade Commission Act delegates to the Attorney General, rather than to the Commission, the authority to seek mandamus for compliance with the Commission's orders that the conditions of the Expediting Act, which requires that the United States be plaintiff, is met in this case. The analogue to this provision appeared, as well, in the Interstate Commerce Act of 1887, §20(9), now 49 U. S. C. §20(9). That §2 of the Expediting Act has not been interpreted to cover these mandamus suits is indicated by *United States* v. *Munson S.S. Line*, 33 F. 2d 211 (D. Md. 1929), aff'd, 37 F. 2d 681 (4th Cir. 1930), aff'd, 283 U. S. 43 (1931), in which a suit by the Attorney General under §20(9) was heard first in the district court, then appealed to the Circuit Court of Appeals for the Fourth Circuit, and finally heard on certiorari in the Supreme Court with no discussion whatsoever of the jurisdictional question. In light of the policy objectives of the Expediting Act, we conclude that these proceedings were not to be brought into the class of those entitled to accelerated review merely because the Attorney General had the sole authority to seek their enforcement. Accordingly, we hold that these appeals are properly before this court.

II.

The information requested by the Commission was to be submitted in "special reports" pursuant to §6(b) of the Federal Trade Commission Act, 15 U. S. C. §46(b), which

is set forth in the margin.[6] St. Regis contends that the Commission's authority to require special reports under §6(b) does not extend to antitrust investigations but is limited to discovery of unfair competitive practices under §5 of the Act and violations of court or agency decrees entered under that section.

In *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950), the Supreme Court upheld a Commission order requiring corporations to file reports showing how they had complied with an earlier order of the Commission. The respondent corporation in that case contended that §6(b) could be used only in aid of the Commission's power to compile information for general economic surveys under §§6(a) and 6(f) and was independent of the enforcement procedures set forth in §5. The court rejected this contention and held that §6 could be used for "any purpose within the duties of the Commission, including a §5 proceeding." 338 U. S. at 649. Since §5 "minimally * * * registers violations of the Clayton and Sherman Acts," *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 609 (1953), the §6

6. Sec. 6

"The Commission shall also have power * * * (b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

powers are available to the Commission in precomplaint antitrust proceedings as well.

The respondents here maintain, however, that the statement in *Morton Salt*, insofar as it authorizes antitrust investigations, should be read as referring to §§6(c), (d), and (e) which explicitly delegate to the Federal Trade Commission the following duties: at the behest of the Attorney General to investigate compliance with antitrust decrees; upon the direction of the President or either House of Congress to investigate alleged violations of the antitrust acts; and upon application by the Attorney General to recommend readjustments in the business of any corporation alleged to be violating the antitrust acts. These investigations, when carried out by the use of the usual discovery tools provided for in §9, it is argued, constitute the limit of the Commission's authority with regard to the antitrust acts. The legislative history of the statute, as well as reasonable statutory construction, belie these contentions.

It is clear from the House and Senate reports that the purpose of §6 was to give the Commission the powers with respect to investigating and reporting on antitrust matters that were previously committed to the Bureau of Corporations in the Department of Commerce. In the form first passed by the House[7] §3 of the Act expressly transferred these functions, and §9 required corporations of a minimum size to furnish annual and special reports and such information, statements, and records relating to organization, financial condition, and relation to other corporations as the Commission would require. Section 16 then gave the Commission subpoena powers identical to those given to the Interstate Commerce Commission by the

7. H.R. 15613, 63d Cong., 2d Sess. (1914).

Act of 1887. The report accompanying the Committee draft of the bill, H. R. Rep. No. 533, 63d Cong., 2d Sess. (1914), said that while the investigative powers which had been given to the Bureau of Corporations had been extensive, "there was a failure specifically to require the regular gathering of certain most important kinds of information through the medium of annual reports from industrial corporations engaged in interstate commerce." *Id.* at 2. The report requirement, together with a $100-a-day penalty for default, was therefore incorporated into the then §9. The Senate, in proposing an entirely new draft,[8] authorized the Commission in its §3(b) to require corporations to furnish information and records concerning their business and their relations to other corporations and to produce for examination all papers relating to the commerce in which the corporations under inquiry were engaged. In addition, §3(c) authorized the Commission to require annual and special reports, and §8 gave it the investigative powers possessed by the Interstate Commerce Commission. These powers of investigation were said to be "not greatly in excess of those possessed and for years exercised by the Bureau of Corporations." S. Rep. No. 597, 63d Cong., 2d Sess. 12 (1914). Thus, both versions agreed in giving the Commission power to investigate by requiring annual and special reports as well as by ordering records to be produced.

In conference, however, these powers were merged into §§6(a) and 6(b), and the subpoena power was spelled out in §9.

The House conferees' report said:

> "The Bureau of Corporations is abolished, as in the House Bill, and its powers are conferred on the

8. S. 1460, 63d Cong., 2d Sess. (1914).

> Commission. Instead of transferring them by reference to the original act creating the bureau, as in section 3 of the House Bill, they are explicitly set out in section 6, paragraph (a), of the bill as agreed to by the conferees. This has been done because the bill now gives to the Commission certain powers which so continuously and directly concern the business interests of the country that it is desirable to have the law show on its face its exact extent and application." H. R. Rep. No. 1142, 63d Cong., 2d Sess. 18 (1914).

The report manifests quite clearly Congress' intent to have the Commission assume the powers of the Bureau of Corporations and its expression of that intent in §§6(a) and 6(b).

Moreover, there is no indication in the statute that antitrust investigations are in any way distinguishable procedurally from investigations directed at uncovering violations of the unfair-competition aspect of §5. The detailed enumeration of duties in §§6(c), (d) and (e) neither expressly nor impliedly denies the Commission the power to proceed upon the request of the Attorney General, President, or Congress by use of the powers granted by §6(b); the inclusion of all these provisions within one section of the statute suggests the contrary. And if the Commission may investigate charges of antitrust violations filed by Congress or the President by directing that annual or special reports be filed, it would be anomalous to deny it the use of these same techniques when it is exercising its own obligation under §11 of the Clayton Act to police violations of §7. We therefore hold that the Commission is empowered under §6(b) to require reports with respect to investigations into possible violations of the antitrust laws.

No challenge has been made by the appellants to the scope of the Commission's order, so we do not now undertake to decide whether §6(b) and §9 provide alternative routes or whether only material which cannot be reached by the subpoena power of §9 may be demanded in a §6(b) order.

III.

Among other papers which the Commission directed be produced by St. Regis and its affiliates were copies of various schedules submitted to the Bureau of Census for the 1954 and 1958 Census of Manufactures, the 1955, 1956, and 1957 Surveys of Manufactures, and correspondence relating thereto. The respondents did not contend that copies were not available but maintained instead that ordering their production violated the confidentiality provision of §9 of the Census Act, 13 U. S. C. §9.[9] However, the plain terms of that statute apply only to the Department of Commerce and do not bar any other federal agency from divulging such information if it comes from different sources or from demanding that a copy remaining in the respondent's files be produced. The purpose of the prohibition addressed to the Secretary of Commerce and his staff

9. "Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

"(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

"(3) permit any other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports."

in the Census Act is served if they are denied the power to transmit submitted information to other governmental agencies or to individuals. But there is no reason to protect absolutely the underlying data or to insulate the source of the information from any further inquiry. The manufacturer is under no statutory obligation to hold a copy of his submitted schedule in his files; if he chooses in this way to keep a summary of information which is scattered throughout his records, the particular paper on which the data is collected is no more immune from ordinary discovery procedures than any other document in his possession. Although the Census Bureau printed across the bottom of the copy page, "Keep This Copy For Your Files," there was, in fact, no obligation on the respondents to do so. Clearly the Census Bureau's action cannot confer any immunity on such records through gratuitous suggestion. We agree with the district court that the protection afforded income tax returns under §6103 of the Internal Revenue Code of 1954 presents a close analogy. The originals of such returns are confidential, but copies retained in the taxpayer's files are subject to subpoena. E.g., *United States* v. *O'Mara*, 122 F. Supp. 399 (D. D. C. 1954). We disagree with the Seventh Circuit's decision regarding this same issue in *FTC* v. *Dilger*, 276 F. 2d 739 (7 Cir. 1960), cert. denied, —— U. S. —— (1960).

IV.

We turn now to the question whether, under the circumstances, the statute required the district judge to assess a penalty of $100 against St. Regis for each day on which it was in default in filing the requested reports. The district court decided that although the Commission had the power

to issue the orders, some of the questions propounded and requests made were too vague to be enforced. Finding authorization to modify enforcement of the orders in §6(c) of the Administrative Procedure Act, 5 U. S. C. §1005(c), Judge Ryan directed that only the enforceable questions be answered. Cf. *NLRB* v. *Anchor Rome Mills, Inc.*, 197 F. 2d 447 (5 Cir. 1952). He held, however, that the forfeiture provided in §10 of the Federal Trade Commission Act was "sufficiently analogous to a criminal sanction" to justify applying to it the requirements of clarity and certainty ordinarily demanded of criminal penalties. Since approximately twelve percent of the questions asked in all the orders were held to be vague and uncertain, the district judge refused to assess the $100-a-day penalties demanded by the United States.

The United States appeals only from the refusal to assess penalties and does not dispute Judge Ryan's decision that twenty-eight questions were too vague to be answered. Thus, the only question before us on the appeal of the United States is whether the district court committed error in dismissing the government's claim for statutory penalties.

Were this a case involving a single oversight or an honest mistake in a good-faith attempt to comply with the Commission's order, the statute's absolute and imperative terms would not prevent us from assuming that it could not have been Congress' intent so severely to punish an innocent offender. *United States* v. *Northern Pac. Ry.*, 242 U. S. 190 (1916); see *Kerr S.S. Co.* v. *United States*, —— F. 2d —— (2 Cir. 1960). The facts before us, however, suggest no such mitigating circumstances. The respondents cannot claim that theirs was merely an honest omission since they refused to accede to many of the Commis-

sion's requests for documents and information on the sole ground that the Commission had no authority to demand what was requested. That the respondent's recalcitrance was caused by a wrong guess on a disputed issue of law does not prevent it from being held to "lawful consequences attached to the refusal." *Life & Cas. Ins. Co.* v. *McCray*, 291 U. S. 566, 574 (1934); see *United States* v. *Clyde S.S. Co.*, 36 F. 2d 691 (2 Cir. 1929); *FTC* v. *Maynard Coal Co.*, 22 F. 873 (D. C. Cir. 1927).

The respondents argue, however, that the reports demanded by the Commission in the present case consisted of questions directed at particular information, and that a comparison of §6(b) with §10 discloses that although the Commission is empowered to order the filing of "answers in writing to specific questions" as well as annual or special reports, it is only the failure to file reports which is penalized by §10. In support of this contention we are urged to consider the decision in *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y. 1938).

The information requested by the Commission is indeed much like that demanded in the *National Biscuit Co.* case, see 18 F. Supp. at 669-70, but it is by no means certain that we would have agreed with the district court's disposition of that case had it been appealed. On the facts of this case we cannot say that the orders directed at St. Regis were requests for "answers to specific questions" rather than demands for reports. The line between the two is, by the nature of each, quite indistinct. Reports that are demanded by the Commission will necessarily be addressed towards more-or-less specific inquiries. A compliance report conveys details concerning activity undertaken pursuant to an order; an investigation report divulges facts concerning suspected violations. It would be totally unreasonable to

withdraw from the Commission the coercive effect of the §10 penalty whenever it makes its wants known in detail but permit it to use the threat of a mounting forfeiture so long as it cloaks the foci of inquiry behind general language. Although it is entirely reasonable to read the statute so as not to fine one who has failed only to respond to one or several specific interrogatories and to remit the Commission to a suit in mandamus for enforcement of such a request, when the quantity of interrogatories reaches the proportions of those in this case and the request is made pursuant to a full investigation of a respondent's course of conduct, the cumulative effect of all the questions is substantially that of a request for a report.

The respondents further urge that infliction of the penalty would violate the due process clause of the Fifth Amendment since they would be unable, under *FTC* v. *Claire Furnace Co.*, 274 U. S. 160 (1927), to test the validity of the order save by awaiting and defending the suit in mandamus, with penalties accumulating all the while. If judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply, the procedure might not meet the established standards of due process. Cf. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920). However, the *Claire Furnace* case was decided before either the Declaratory Judgment Act of 1934, 48 Stat. 955, or the Administrative Procedure Act of 1946, 60 Stat. 237, was enacted. Mr. Justice Jackson, speaking for a unanimous Court in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 654 (1950), intimated broadly that *Claire Furnace* should not stand in the way of declaratory relief or prompt review if that be necessary to rescue the penalty provision from attack under the Fifth Amendment. We hold that

under the declaratory-judgment statute as it now stands, 28 U. S. C. §2201, a proceeding brought to test the validity of an administrative agency's demand for a special annual report, when daily penalties may be assessed for failure to comply with any valid request, amounts to a "case of actual controversy" and is within the jurisdiction of the United States district courts. The respondent bringing such an action would be effectively denied judicial review if he is permitted no forum in which to challenge the validity and scope of the agency's order; his injury, therefore, is immediate enough to warrant judicial intervention even if the agency is not prepared to institute court proceedings to achieve compliance. Since the statute confers discretion on the courts to act when the injury is irremediable, *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237, 241 (1952); *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U. S. 426, 434 (1948), and since the controversy between the parties is clear, and the potential injury to the respondent is evident, the exercise of equitable discretion is appropriate. Moreover, it is only if such a remedy is available that the forfeiture sanction can withstand attack on due process grounds.

We are also of the opinion that a remedy was available to St. Regis under §10(c) of the Administrative Procedure Act, 5 U. S. C. §1009(c). The investigatory order authorized by §6(b) of the Federal Trade Commission Act may not satisfy the statutory definition of "order" in §2(d) of the Administrative Procedure Act, 5 U. S. C. §1001(d), since it may not be a "final disposition." However, the order amounts to a "sanction" under §2(f) since nonperformance of the Commission's demand entails a penalty of $100 a day, and the directive therefore constitutes "compulsory or restrictive action."

The availability of this relief also mitigates the dilemma which our decision here imposes upon district judges. Although modification of an agency's order under §6(c) of the Administrative Procedure Act results in the most efficient treatment of a partially void order, it carries with it the imposition of penalties for prior noncompliance. A district judge might believe that the assessment of a forfeiture would be unfair in light of the substantial defects in the agency's order, and might thus be encouraged merely to deny the petition for mandamus thereby forcing the agency to re-issue the valid portions of its order. Whether, as a result of §6(c) of the Administrative Procedure Act, such a total refusal may be sustained is a question which hinges on the construction of the word "subpoena" in the statute, and we do not decide it here. In view of the opportunity given to a respondent to attack an order requesting a special report by a declaratory-judgment proceeding, the exaction of the statutory penalties for noncompliance is fair in any case in which the respondent awaits a mandamus action before contesting the agency's demands, and the order is held valid.

Finally, we agree with Judge Ryan's decision—which the United States has not disputed in its briefs—that only one course of conduct was being investigated and that the second order issued to St. Regis was merely supplementary to the first. Thus, only one penalty of $100 should be assessed for each day of noncompliance.

The judgment below is, therefore, reversed insofar as it dismissed the demand for penalties under §10 of the Federal Trade Commission Act, and the case is remanded with instructions to enter judgment for the United States in the amount of $100 a day for each day on which St.

Regis was in default of the first order requiring a special report.

FRIENDLY, Circuit Judge (concurring):

I join in Chief Judge Lumbard's disposition of the many issues in this case. But I see little basis and less occasion for the statement that the availability of methods for securing an early determination of the validity of a direction under §6(b) of the Federal Trade Commission Act, pursuant to statutes passed long afterwards, necessarily renders exaction of the statutory penalties "fair" in any case where the respondent has not chosen to use them. If he prefers to await suit and then succeeds in demonstrating such extensive invalidity that there is no longer an intelligible requirement for an "annual or special report," he is entitled to prevail. Per contra his utilization of the Declaratory Judgment Act or the Administrative Procedure Act will not avail him if he proves wrong, save, of course, for such periods as the direction has been stayed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16—OCTOBER TERM, 1960

DOCKET NO. 26413

UNITED STATES OF AMERICA,
Appellant,

v.

ST. REGIS PAPER CO.,
Appellee.

Before LUMBARD, Chief Judge, TUTTLE and FRIENDLY, Circuit Judges.

The mandate is stayed for a period of 30 days pending application to the Supreme Court of the United States for a writ of certiorari, and subject thereafter to the provisions of Rule 28 (c)(2) of this court; and provided further that should the Supreme Court limit any grant of certiorari to less than all of the issues presented, then the stay of mandate shall automatically dissolve with respect to the issues on which certiorari is not granted.

/s/ Elbert P. Tuttle
(per HJF)

10 January 1961 /s/ Henry J. Friendly

I concur, but I would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this court is stayed.

/s/ Edward J. Lumbard

Texts of Relevant Statutes

Federal Trade Commission Act

Section 4

38 Stat. 719 (1914); 15 U.S.C. §44 (1952)

"'Antitrust Acts' means the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890; also sections 73 to 77, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', approved August 27, 1894; also the Act entitled 'An Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes"', approved February 12, 1913; and also the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914."

Section 5

66 Stat. 631 (1952); 15 U.S.C. §45 (1952)

(Because of its length, this statute has been omitted)

Section 6

38 Stat. 721 (1914); 15 U.S.C. §46 (1952)

"Sec. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the Antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable."

SECTION 9

38 Stat. 719 (1914); 15 U.S.C. §49 (1952)

"SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of

examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending

under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

* * *"

SECTION 10

38 Stat. 719 (1914); 15 U.S.C. §49 (1952)

"That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corpora-

tion, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000 or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be

deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

ADMINISTRATIVE PROCEDURE ACT

SECTION 6

60 Stat. 237, 240 (1946); 15 U.S.C. §1005(b) (1952)

"SEC. 6. Except as otherwise provided in this Act—

• • •

(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) SUBPENAS.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the

evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

* * *"

SECTION 10

60 Stat. 237, 243 (1946); 5 U.S.C. §1009 (1952)

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not

directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory

jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

CENSUS ACT

SECTION 5

68 Stat. 1013 (1954); 13 U.S.C. §5 (1954)

"SEC. 5. *Schedules; number, form, and scope of inquiries.*

The Secretary shall prepare schedules, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title."

CENSUS ACT

SECTION 9

68 Stat. 1013 (1954); 13 U.S.C. §9 (1954)

"SEC. 9. *Information as Confidential; exception*

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records."

EXPEDITING ACT

32 Stat. 823 (original text, 1903)

1. "Chap. 544.—An Act To expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled 'An Act to protect trade and

commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

"SEC. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the Circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may

be taken from such decree to the Supreme Court in the manner now provided by law."

Approved February 11, 1903.

Section 17 of the Act of June 25, 1948, c. 646, 62 Stat. 989, 15 U.S.C. §29 (1951) amended Section 2 to read as follows:

"SEC. 2. In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."